

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

TECNOCAP LLC

And

Case 06-CA-216499

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS, INTERNATIONAL UNION (USW),
AFL-CIO, CLC**

**BRIEF ON BEHALF OF COUNSEL FOR THE GENERAL
COUNSEL TO ADMINISTRATIVE LAW
JUDGE MICHAEL A. ROSAS**

Submitted by:

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**NATIONAL LABOR RELATIONS
BOARD, Region Six
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222**

**Dated at Pittsburgh, Pennsylvania,
this 2ND day of April, 2019**

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**BRIEF ON BEHALF OF COUNSEL FOR THE GENERAL COUNSEL TO
ADMINISTRATIVE LAW JUDGE MICHAEL A. ROSAS**

I. PRELIMINARY STATEMENT

Based on an amended charge filed with Region Six of the National Labor Relations Board (“the Board”) by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (“the Union”), a Complaint and Notice of Hearing issued on June 27, 2018 [GCX1(d)]¹ against Tecnocap, LLC (“Respondent”).

The Complaint alleges that Respondent violated Section 8(a)(1) of the Act by announcing to unit employees that it would lockout only those unit employees who were members of the Union and by impliedly soliciting its employees to resign their membership in the Union in order to continue working during the planned lockout of members of the Union. In addition, the Complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by locking out its employees who were members of the Union, while permitting its employees who were not members of the Union to continue working.

Finally, the Complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by insisting as a condition of reaching any collective-bargaining agreement that the Union agree to change the scope of the bargaining unit, a permissive subject of bargaining, and by partially implementing its last best and final offer by expanding the bargaining unit without the consent of the Union; by bypassing the Union and dealing directly with its employees by soliciting its

¹ “GCX” designates General Counsel’s exhibits; “JX” designates joint exhibits; “CPX” designates Charging Party’s exhibits; and “RX” designates Respondent’s exhibits. Numbers in parentheses indicate page numbers in the official transcript and the exhibits.

employees to enter into individual employment contracts with Respondent in order to work during the lockout of employees who were members of the Union; and by, during the partial lockout, failing to inform the Union of the terms under which the partial lockout could be ended.

In its Answer, Respondent admitted the filing and service of the initial charge and amended charge, commerce and jurisdictional facts and conclusions, the Union's status as a labor organization, the supervisory and agency status of various individuals named in the Complaint, the Unit description and the Union's status as the exclusive collective-bargaining representative of the Unit. Respondent also admitted to certain factual averments set forth in paragraphs 7(a) and 8 of the Complaint.

A hearing was held in this matter in Pittsburgh, Pennsylvania, on February 12, 2019, before Administrative Law Judge Michael A. Rosas. The Administrative Law Judge afforded both parties full opportunity to present opening statements and to call witnesses for direct and cross examination. The facts, as disclosed at the hearing, are set forth below.

II. QUESTIONS PRESENTED

- A. Did Respondent violate Section 8(a)(1) the Act when, during contract negotiations, it engaged in the following conduct:
 - a. Posted notices announcing to its employees represented by the Union that it would lockout only employees who were members of the Union?
 - b. Posted a notice impliedly soliciting its employees represented by the Union to resign their membership in the Union to continue working during the planned lockout of members of the Union?
- B. Did Respondent violate Section 8(a)(3) of the Act when it locked out its employees who were members of the Union, while permitting its employees who were not members of the Union to continue working?
- C. Did Respondent violate Section 8(a)(5) of the Act when, during contract negotiations, it engaged in the following conduct:

- a. Insisted as a condition of reaching any collective-bargaining agreement that the Union agree to change the scope of the bargaining unit, and partially implemented its last, best and final offer by changing the scope of the bargaining unit without consent?
- b. Bypassed the Union and dealt directly with its employees represented by the Union by soliciting employees to enter into individual employment contracts with Respondent to work during the partial lockout?
- c. During the partial lockout withdrew its last, best and final offer and failed to inform the Union of the terms under which the partial lockout could be ended?

III. STATEMENT OF FACTS

A. Background

Respondent has manufactured customized and stock steel and aluminum closures at its plant in Glen Dale, West Virginia (“Respondent’s facility”) since 2006. The facility was previously owned and operated by Penn-Wheeling Closure (66).² Respondent’s production and maintenance employees are represented by the Union.³ A second union, International Association of Machinists and Aerospace Workers Local 818 of District 51 (IAM), represents Respondent’s tool & die makers, machinists, electricians, die setters and their apprentices (JX-34, par. 7).

² The parties entered into numerous joint stipulations regarding facts as well as the authenticity and admissibility of joint exhibits. The joint stipulations are set forth in Joint Exhibit 34 (JX-34).

³ The parties stipulated that the Union was formerly known as Glass, Molders, Pottery, Plastics & Allied Workers International Union (GMP), and its Local Union No. 152, AFL-CIO, CLC. The GMP and its constituent local unions, including Local Union No. 152, merged into, and became a part of, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers, International Union (USW) pursuant to a merger agreement between the GMP and USW dated January 21, 2016, with an effective date of January 1, 2018 (“Merger Agreement”). The Merger Agreement provided that the merger shall not interrupt or in any way change the continuity of collective bargaining agreements and that effective January 1, 2018 all powers, rights, privileges, benefits, authority, duties and responsibilities vested in the GMP and its Local Unions pursuant to bargaining rights and certifications and collective bargaining agreements to which the GMP and/or its Local Unions are a party or beneficiary as of said date, and the right to enforce same, shall be vested in the USW and its Local Unions as though they, and not the GMP and its Local Unions, had originally been named as a party thereto or beneficiary thereof. As a result of the Merger Agreement, GMP Local Union 152 was chartered as USW Local Union 152M (JX-34, pars. 4 and 5).

For some time, Respondent has claimed to have “difficulty covering all of the work that needed to be performed by the production employees” (15). To address this issue, which it refers to as a problem with “continuity of production,” it sought in 2015 to use employees represented by the IAM to perform the work of employees represented by the Union during the second groups’ lunch and break times. Respondent met with representatives of both unions to address this concern, but was unable to reach agreement, so, in 2016, Respondent unilaterally assigned IAM-represented employees in the Die Setter classification to provide lunch and break coverage for production employees represented by the Union (JX-34, pars. 10 and 11). This unilateral action led to a series of grievances which culminated in an Arbitrator’s decision which ordered Respondent to cease and desist its unilateral actions (JX-5, JX-34, par. 12). In its opening statement at the present hearing, Respondent admitted that its inability to resolve its production issues by unilaterally assigning production work to IAM-represented employees, “would be a major topic, if not the sole exclusive topic that needed to be resolved prior to the institution of any further collective bargaining agreements” with either union (15).

B. Initial Contract Negotiations

The existing collective-bargaining agreement between Respondent and the Union was set to expire by its terms on November 18, 2017 (JX-1).⁴ Bargaining for a successor collective-bargaining agreement between Respondent and the Union commenced on October 30, 2017. Nineteen bargaining sessions were held over a six-month period. At each session the Union was represented by International Representative Pete Jacks, Local Union President Lisa Wilds, and Local Union officers Dennis Lattocha, Kathy Paske and Gerry Cunningham. Respondent was represented by its Director of Human Resources and Lead Negotiator Darrick Doty, Legal

⁴ The collective-bargaining agreement between Respondent and the IAM expired by its terms on April 8, 2018 (JX-3).

Counsel Bradley Shafer, and Plant Manager Ric Smith. During meetings held in 2017, Respondent was also represented by its former Director of Human Resources Charles Thomas. Respondent's President Paolo Ghigo only attended the final meeting held on March 19, 2018. Bargaining sessions were held at hotels located in Moundsville and Wheeling, West Virginia (JX-34, pars. 13-15).

At the fourth session, held on November 9, 2017, Respondent proposed reducing the number of job classifications in the unit represented by the Union from 14 to three, to be known as the Operator 1, 2 and 3 classifications. Respondent proposed placing all employees in the bargaining unit represented by the Union into the Operator 1 and 2 classifications. Importantly, Respondent proposed placing some Die Setter employees represented by the IAM, and their duties, into the Operator 3 classification (JX-34, par. 17). Along with its proposal, Respondent gave the Union job descriptions for the three classifications (JX-4). It is undisputed that all job-specific duties set forth in the Operator 3 job description were, at the time, only performed by IAM-represented employees, and not by employees represented by the Union (71-72).⁵ In response, Jacks reminded Respondent that "we don't have jurisdiction over the die setter work, the IAM does, therefore, we couldn't discuss it" (72).

On November 15, 2017 Respondent and the Union signed a Memorandum of Agreement (MOA) to extend the current bargaining agreement to February 28, 2018. By the terms of the MOA, the Union accepted the creation of Operator 1, 2 and 3 job classifications with the caveat that negotiations would "continue as to red-circling, grandfathering, and who falls in what class" (JX- 5, p. 3). The MOA made no mention of the die setter position or the job descriptions

⁵ Local Union President Lisa Wilds testified that of the work listed in the Operator 3 job description, the only jobs that had been performed by unit employees, were those done by "everybody," including such mundane tasks as keeping their "assigned area and equipment clean and orderly," to follow "work instructions," and to "assist and cooperate with co-workers" (72).

proposed by Respondent (98, JX-2). Importantly, no agreement was reached as to which jobs would go into which classification, or whether the Operator 3 classification would be filled by Union-represented employees or by die setters represented by the IAM (78).

Respondent and the Union continued to meet and exchange proposals over the next few months. Throughout negotiations Respondent consistently took the position that “it is the company’s intention to move the die setters to class 3 operator, something which has been discussed at length in negotiations” (58-59, JX-22). The Union did not agree and instead proposed, on February 12, 2018, to place four current Union-represented unit jobs into the Operator 3 classification (58, GCX-3).

C. Last, best and final offer on February 15, 2018

At a bargaining session held on February 15, 2018 Respondent presented the Union with the first of several last, best and final offers. In its February 15 offer Respondent rejected the Union’s proposal to place union-represented employees in the Operator 3 classification and reiterated that the Operator 3 position would be for the work set forth in its Operator 3 job description, the majority of which being work performed by die setters. (JX-6). Respondent’s lead negotiator, Darrick Doty emphasized at the bargaining table that day, that the Operator 3 “classification is for the die setters, that’s reserved for the die setters and their work” (75).

During the same meeting, Respondent presented its proposal setting forth the new job classification and wage rates of each employee in the unit represented by the Union. All but one of the unit employees were assigned to either the Operator I or II classification (73, JX-7). The only employee assigned by Respondent to the Operator 3 classification was Scott Shimp. Shimp, however, was not part of the unit represented by the Union. Rather, he was the least senior die setter in the IAM unit. Since 2016, when Shimp would otherwise be scheduled for layoff from

his die setter position, he was given the opportunity to work as a press operator, because, earlier in his career, he had worked as a press operator (24, 47-48, 73-74). He did not, however, pay dues to the Union while temporarily working as a press operator (47), and, during the 2017-2018 negotiation period, Shimp worked in the IAM unit as a die setter (25). The wage rate proposed by Respondent for the Operator 3 position, was the rate paid to die setters in the IAM unit at the time (25). Respondent proposed placing all other press operators in the Operator I classification (JX-7).

During the February 15, 2017 bargaining session the Union questioned why Shimp was assigned the higher rate.⁶ Union president Wilds testified that Doty replied that “they were going to pay people for their knowledge, for what they knew and what they could do and their skill set, and he was a die setter, and Paolo [Ghigo] wanted the die setters in [O]perator 3, that’s why he [Shimp] was in operator 3” (74).

Respondent’s last best and final offer was presented to the bargaining unit for ratification on February 18, 2017 and was rejected (75-76). By letter dated February 21, 2017, the Union advised Respondent that the membership had overwhelmingly rejected Respondent’s proposal. The Union offered to meet and bargain before the contract extension expired on February 28, 2017 and indicated that it was prepared to make a new proposal (JX-8).

Respondent initially agreed to meet on February 26, but on the evening of February 25, 2017 Respondent cancelled the meeting (JX-9). In its email to the Union, Respondent indicated that it believed the parties were at impasse, stating that upon expiration of the contract extension the unit employees would, “work pursuant to language that has been agreed upon or on which we have reached impasse” (JX-9). In response, by letter dated February 27, the Union highlighted

⁶ A review of JX-7 indicates that the proposed Operator 3 rate is over 30% higher than the rate Respondent proposed for the other press operators.

the Union's recent concessionary proposals, including lower wage demands, and requested a resumption of bargaining (JX-10). Later that day Respondent, by email, replied to the Union that the parties "continue to register impasse" on three "main points" including the three new job classifications. (JX-11).

D. Declaration of impasse and partial implementation on February 28, 2018

The parties returned to the bargaining table on February 28, 2018, and Respondent presented the Union with a second last, best and final offer (25, JX-13). Doty had claimed in his February 27 email to Jacks "the three job classifications have been the main point on which extension was granted in November" (JX-11). Jacks responded at the February 28 bargaining session by handing Doty a one-paragraph document, which set forth the Union's long-standing position regarding the Operator 3 classification, stating:

The third job classification which the Company is insisting upon in bargaining consists exclusively of work that is not in the GMP Council/USW bargaining unit and does not belong to the GMP Council/USW. All of the work in this 'third job classification' belongs to the IAM. The GMP Council/USW has repeatedly advised the Company that there is no basis for the parties to bargain over this third job classification which does not belong to the GMP Council/USW. This is an improper subject for bargaining. To the extent that the Company considers this a permissive subject of bargaining you are advised that the GMP Council/USW does not wish to bargain on this issue. You appear to believe that the Company can bargain to impasse over this issue. You are incorrect

(78, 101-102, GCX-2).

Respondent ignored the Union's advice. The following day, on March 1, 2018, Respondent posted a notice to "GMP Union Members" entitled "Communication GMP Contract – Impasse" (JX-14). The notice was posted on the employee bulletin board located in the center of Respondent's facility next to the employee lunch area (79). In its March 1 notice, Respondent informed its employees that it would immediately implement portions of its last best and final offer, stating that "[e]ffective today, the jobs are organized into three classifications only" (JX-

14). Respondent concedes that it implemented its proposal to create the Operator 1, 2 and 3 classifications on March 1, and that bargaining unit members were assigned to the Operator 1 and 2 classifications while the Operator 3 classification was, at the time, left unfilled (JX-34, par. 29).

E. Respondent announced that it would only lockout Union members

On March 5, 2018 Respondent posted a second notice on the employee bulletin board (79). The notice was addressed to “GMP Union Members” and was entitled “Lockout Notice GMP Bargaining Unit” (JX-15). In pertinent part, Respondent, informed its unit employees that:

We regret to inform that decision is made to exercise the employer lockout right effective next Tuesday March 13th (emphasis in original). Unless notified otherwise, **GMP Union members won't be allowed to enter into the property** from that date on and until an agreement between the parties is reached (emphasis added)

(JX-15). Respondent also told employees that they could contact the Human Resources department with any questions they may have (JX-15).

Respondent's statement that only Union members would be locked out had the expected effect. Local President Lisa Wilds testified that she worked on the midnight shift that day. After returning home to sleep she awoke to find that her text messages were “going off like crazy” with pictures of the notice and panicked statements from coworkers that they “weren't going to have jobs” (80). When she arrived at work she was informed by coworkers that “20 people were pulling out of the union, they were not going to be union members, they were going to go ‘right to work’ so they could work during the lockout” (80).

After Respondent posted the Lockout Notice employees came to speak with HR Director Doty about the lockout. Doty admitted that unit employees asked how they could resign from the union and “asked me if they dropped out of the union, could they continue to work” (26).

Doty responded to their inquiries by posting another notice to employees which informed them how they could become temporary employees (27). In this notice, posted on the employee bulletin board on March 7, Doty reiterated that “[t]he **Lockout applies only to GMP union members**. Members of the IAM, salaried personnel, and others are expected to work” (emphasis added) (JX-16).

F. Last Best and Final offer on March 9, 2018

The parties met again on March 9, 2018. At that meeting the parties discussed the unilateral implementation of the three new job classifications. Wilds testified that while Doty contended that the parties had agreed to the three job classifications in November 2017, Jacks pointed out that they had not agreed to which jobs would go into which classification and what the wage rates would be (78). Wilds testified that in discussing the Operator 3 classification, Doty reiterated that the Operator 3 “classification couldn’t have any of our people in it; it was for the die setters and their work when they came over from the IAM to the USW...” (78). Later that night Doty emailed Respondent’s third last best and final offer to the Union. The offer, which only included items that were still left on the table, again insisted on the creation of the Operator 3 classification (29).

G. Lockout Notice and solicitation of applications for temporary employment on March 12, 2018

On March 12, 2018 Respondent posted on the employee bulletin board in Respondent’s facility a document entitled “Lockout Notice” (JX-18). The notice told employees that

[A] lockout of the GMP will begin tonight, March 12, 2018, at 11pm. As stated in the Company’s earlier posting about Lockouts, **The Lockout applies only to GMP union members**. Members of the IAM, salaried personnel, and others are expected to work

(JX-18) (emphasis added).

Respondent also invited employees to change their employment status so that they could work during the lockout by informing them that “[t]he Company will be hiring temporary employees during the lockout. If you wish to apply for a position, please see Darrick Doty (JX-18).

H. Resignation from Union of six bargaining unit members

Bargaining unit members quickly took up Respondent’s offer. On March 12, three members of the unit represented by the Union - Joseph Birkheimer, Christopher D. Williams Jr., and Christopher D. Williams Sr. - submitted letters notifying Respondent that they had resigned from the Union (JX-32, pp. 260-262). In resigning from the Union, they joined three other bargaining unit members, Jeffrey Mealy, Peggy Stachura, and Danny Robertson who had also recently resigned their membership in the Union (JX-32, pp. 263-265).

I. The Lockout

a. Respondent prohibited Union members from entering Respondent’s facility

The lockout began at 11:00 pm on Monday night, March 12, 2018. Lisa Wilds testified that fifteen minutes before the start of her 11:00 pm or “Midnight” shift, she and her husband, who was also employed by Respondent, pulled up to the plant gate. They were stopped at the gate by a security guard who approached the side of their car. He asked them to identify themselves, which they did. The guard, after looking at a clipboard in his hand, informed Wilds and her husband that they were not on the list, and he directed them to leave the premises (82).

Wilds and her husband drove to the parking lot of a nearby restaurant where they met with other locked-out employees. The employees then set up picket lines at both plant entrances. Wilds was on the picket line each day of the lockout and observed that, unlike the Union members, the six members who had recently resigned from the Union, Mealy, Stachura,

Robertson, Birkheimer, Williams Jr. and Williams Sr., entered the plant to work each day (82-83).

b. Respondent hired unit members who resigned from the Union to work as temporary employees during the lockout

As the lockout began Respondent “hired” the six former Union members to work as temporary employees (27, 29). On the first day of the lockout the six former Union members came to the facility and met with Darrick Doty. Doty presented them with letters of hire which he had drafted (33). The letters, each of which was also executed by Doty, “confirmed” that each of the employees who had resigned from the Union had been “offered” positions of employment (JX-26). Each employee was assigned to perform the same work as they had performed before the lockout (35). The letters of hire further confirmed that the terms of their employment had changed; they would now become “employee(s) at will” (JX-26). In his testimony, Doty conceded that this was a change since members of the bargaining unit were not employees at will and that Respondent had not negotiated with the Union regarding this change, or regarding the letters of hire at all (32-34). Each employee was assigned to perform the same work as they had performed before the lockout (35). The six had been scheduled to perform this work before the lockout was implemented (JX-33).

Respondent stipulated that during the period of the lockout, March 13, 2018 through March 21, 2018, Respondent employed the former Union members to perform the work of the unit represented by the Union. During the same period, Respondent paid the six former Union members the higher of the wage rates set forth in Respondent’s last best and final offer (JX-6) or the seniority or flat rate set forth in Joint Exhibit 28 (JX-34, par. 45 - 46). Respondent further stipulated that during same period Respondent locked out its employees in the bargaining unit

represented by the Union who were members of the Union, while permitting its bargaining unit employees who were not members of the Union to continue to work (JX-34, par. 47).

By letter dated March 13, 2018, the Union demanded that Respondent cease and desist from allowing unit members who had resigned their membership in the Union to work during its lockout of Union members (JX-24). In response, by letter dated March 16, 2018, Respondent provided the Union with copies of the letters of hire of “the individuals that ended their affiliation with the Union and are currently working” (JX-25).

c. Expiration of last, best and final offer on March 13, 2018

On March 13, 2018 at 10:06 a.m., Doty sent an email message to Wilds informing her “that the last, best and final offer from the company has been given to the union and will expire at 11pm on March 13, 2018” (JX-20). Wilds, as Local Union President, forwarded the email to International Representative Jacks. Jacks, in a letter dated March 14, 2018, requested that Doty confirm “that the Company withdrew its ‘last, best and final’ offer (“LBF”) as of 11:00 p.m. March 13, 2018” (JX-23, p. 2). Respondent did not respond to the Union’s request for confirmation (JX-34, par. 40). Nor did it tell the Union that Respondent’s offer was still on the table (83).

d. Critical correspondence between the parties during the lockout

After Respondent announced that it would implement the layoff, the Union immediately informed Respondent that the Union “remain[ed] willing to negotiate with Tecnocap on a successor agreement on the numerous open issues remaining including, without limitation, economics, job classifications, grievance and arbitration” and stated that it believed “that there is room for both sides to move on open issues” (JX-22).

In the same letter the Union asked if Respondent “intend[ed] to propose that the Die Setter job classification be moved to the [Union-represented] bargaining unit in its upcoming negotiations with the IAM” (JX-22). Respondent replied, in its letter to the Union dated March 13, 2018, that the Union was “fully aware that it is the Company’s intention to move the die setters to Class III Operator, something which has been discussed at length in negotiations” (JX-22).⁷ In the same letter Respondent reinforced the utmost importance of its proposal to move the die setters to the unit represented by the Union by stating:

You have known since last summer that the current contract language is unacceptable to the Company as it prevents the operation of lines and continuation of production during break time. This issue was raised directly with both the IAM and the GMP together, in the same room, with the hopes of coming to a solution acceptable to all. Thus, all of us know that your proposal to simply continue working under the old, expired contract is not a feasible solution

(JX-22).

In the Union’s response dated March 14, 2018, the Union succinctly set forth Respondent’s dual positions regarding the Operator 3 classification: that Respondent sought to move die setters from the IAM unit into the unit represented by the Union to “provide the Company with ‘continuation of production’ during break time,” and that Respondent’s proposals were “based on it successfully negotiating this work away from the IAM and the die setters joining the [Union]” (JX-23). The Union emphasized that this was a permissive subject of bargaining but offered to negotiate with Respondent “on all issues relevant to the die setters” if the IAM relinquished jurisdiction over the die setters, if the die setters joined the Union, and if Respondent recognized the Union as the die setters’ bargaining representative (JX-23).

⁷ International Representative Jacks testified that this statement was “the position they have reiterated throughout negotiations, their intent was to put the die setters over in the USW and it would be the operator class 3” (102).

J. Final bargaining session on March 19, 2018

After Union members had been locked out for a week, the Union and Respondent returned to the bargaining table. In attendance for the first time was Respondent's president and self-proclaimed "decision maker," Paolo Ghigo (84-85).⁸ Once the meeting commenced, Ghigo abruptly announced "I'm going to give you your grievance and arbitration procedure back, I am going to give it back to you" (85).⁹ Wilds thanked him and asked whether the term of the contract could be increased from one to three years. Ghigo replied "that the most he could do was 18 months" (86). Wilds then asked about the proposal for a two-tier wage scale. Even though there had been few items left on the table, Ghigo showed his lack of attention by asking "was that your proposal or ours" (86). When told that it was Respondent's proposal, Ghigo quickly resolved the matter by stating, "we could get rid of that" (86). Ghigo then put a raise package on the table with two options and told the Union to pick one or the other (87, JX-28).

A moment later Ghigo ended the meeting as brusquely as it had started by saying "[t]hat's it, no more discussion, we are out of time, we are out of time. There is no more time. This is on the table until Thursday" (88). And with that, Ghigo stood up and left the meeting with Doty in tow (88).

K. Termination of Lockout

The parties stipulated to the following: that the Union and Respondent reached a tentative agreement on March 19, 2018 (JX-27, JX-34, par. 48); that on March 21, 2018 representatives of the Union informed Respondent that the unit of employees represented by the

⁸ The Union had previously requested Ghigo's attendance several times because "[i]t didn't seem like decisions could be made at the table" because Ghigo "had to be consulted all the time..." (90).

⁹ The inclusion of a grievance and arbitration procedure was an important issue for the Union. In November 2017 the parties had tentatively agreed to a grievance procedure, however in February 2018 Respondent abruptly removed both the grievance and arbitration procedures from its proposals (85-86, 88-89).

Union had ratified the tentative agreement (JX-34, par. 50); and on that same evening representatives of Respondent telephoned locked-out members of the unit represented by the Union, and directed them to return to work on March 22, 2018, ending the partial lockout (JX-34, par. 51).

The parties further stipulated that on March 22, 2018. Respondent sent letters terminating the temporary employment of the six former Union members who had been hired by Respondent to work during the lockout as temporary employees (JX-27); and that since March 22, 2018 the six former union members have worked under the terms of the collective-bargaining agreement, along with the rest of the bargaining unit (JX-29, JX-34 at 52).¹⁰

IV. ANALYSIS

A. Respondent violated Section 8(a)(1) of the Act when it informed its unit employees that it would lockout only those unit employees who were members of the Union, and when it impliedly solicited its employees to resign their membership in the Union to continue working during its planned lockout of members of the Union.

To begin, it is undisputed that the Act broadly protects, and guarantees, an employee's right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . ." 29 U.S.C. § 157. As made clear by the United States Supreme Court, the clause "mutual aid or protection" is liberally construed to cover activities directed at a broad range of employee concerns. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-68 (1978).

More specifically, it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by Section 7, 29 U.S.C. §

¹⁰ Following the end of the lockout, Respondent gave performance bonuses only to the employees who had resigned from the Union (JX-30, 50, 61). HR Director Darrick Doty initially claimed that some of the bonuses were awarded before the employees resigned (35). Later, he admitted that he was not sure when they were given the bonus" (62). The wage rates set forth in JX-30 are identical to the "flat" wage rate offered by Respondent in its final proposal made on March 19, 2018 (JX-28) but differ from Respondent's prior wage rate offer made on February 15, 2018 (JX-7).

158(a)(1). In the same way, it is unlawful for an employer to “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). Consequently, an employer violates the Act when it takes, or threatens to take, an adverse action against an employee for engaging in protected activity.

It is axiomatic that threats which discourage protected activity are unlawful. When evaluating whether a statement constitutes an unlawful threat, the Board does not look to the subjective “intent of the speaker,” but instead determines whether the statement objectively had a “reasonable tendency to coerce the employee or interfere with Section 7 rights.” *Smithfield Packing Co.*, 344 NLRB 1, 2 (2004), *enfd.* 447 F.3d 821 (D.C. Cir. 2006) (internal citations omitted).

So, when Respondent posted in writing on its employee bulletin board on March 5, March 7 and March 12, 2018 that it would **only** lockout Union members and informed them that by resigning from the Union they could remain employed during the lockout, Respondent drew a line between employees who remained members of the Union and employees who had resigned their membership in the Union. Both groups of employees were part of the same bargaining unit represented by the Union. Both groups of employees performed the same types of work, were paid on the same salary scale, and were subject to the terms of the same collective-bargaining agreement. The sole difference between these two groups of employees was that one group consisted of employees who had resigned from the Union and the other consisted of employees who retained their membership.

It has long been held that “[a]n employer’s statement to employees that conditions employment on giving up union membership or activity tends to interfere with, restrain and

coerce employees in the exercise of Section 7 rights and violates Section 8(a)(1).” *Schenk Packing Co.*, 301 NLRB 487, 489 (1991) citing *A-1 Schmidlin Plumbing Co.*, 284 NLRB 1506 (1987), enfd. 865 F.2d 1268 (6th Cir. 1989). Moreover, while an Employer may provide information to employees about resigning from a union without violating the Act, “if it additionally creates a situation in which employees would tend to feel imperiled should they refrain from resigning, the employer’s conduct constitutes unlawful solicitation of resignation from union membership.” *Schenk*, supra, citing *Manhattan Hospital*, 280 NLRB 113, 114-115 (1986), enfd. mem. 814 F.2d 653 (2d Cir. 1987), cert. denied 483 U.S. 1021 (1987).

In *Schenk*, following an earlier partial lockout, the employer distributed a memorandum to the remaining employees informing them that it would “institute a total lockout in which all Union employees will be locked out,” “non-union employees“ would be hired as temporary replacements, “no Union members will be employed as replacements,” and, “if locked out Union employees become non-union members of the labor market, it is possible for them to be hired...” *Schenk* 301 NLRB at 488. Regarding the statements made by Respondent, the Board in *Schenk* found as follows:

Whether one interprets the Respondent’s statements concerning employment conditions during the lockout as a threat of continued layoff for unit employees who do not resign from the Union, or as a promise of consideration for employment for those who effect such resignations, it is abundantly clear that Section 8(c)—which sanctions neither threats nor promises—provides the Respondent no protection. The Respondent’s solicitation of employees’ union resignations in the context of an unprotected threat and promise quite reasonably tended to interfere with, restrain and coerce the unit employees in the exercise of their Section 7 rights, and violated Section 8(a)(1).

Schenk, 301 NLRB at 489, citing *A-1 Schmidlin*, supra., and *Manhattan Hospital*, supra.

In the present case, as in *Schenk*, it is undisputed that Respondent told its unit employees that it would impose a lockout and that only union employees would be locked out. On March 5,

2018 it announced that effective March 13, 2018 “GMP Union members won’t be allowed to enter into the property from that date on and until an agreement between the parties is reached” (JX-15). After employees questioned management how they could continue to work during the lockout, Respondent posted a second notice (26-27). Respondent admits that this second notice was posted in response to employee questions regarding “how do they resign from the union” and “if they dropped out of the union, could they continue to work” (26). Respondent’s March 7, 2018 notice to employees reinforced to them that “[t]he lockout applies only to GMP union members. Members of the IAM, salaried personnel, and others¹¹ are expected to continue to work” (JX-16). Moreover, the notice informed employees how they could work during the lockout as temporary employees (JX-16). And on March 12, 2018 Respondent for a third time reiterated that “[t]he lockout applies only to GMP union members” and invited employees to apply to become temporary employees (JX-18).

At the time these notices were posted, three employees in the unit represented by the Union had already resigned union membership. Since, under Respondent’s terms, “GMP union members” were specifically excluded from working during the lockout, these three former members of the Union were, at the time, the only unit employees eligible to work during the lockout. However, Respondent also invited unit employees to apply to work during the lockout. Again, since “GMP union members” were specifically excluded, it was only reasonable for unit employees to assume that their ability to continue to work was conditioned upon resigning from the Union. And, in fact, three additional unit members resigned from the Union on March 12, 2018 and, along with the three unit employees who had resigned their membership earlier, were immediately hired by Respondent as temporary employees (JX-32 at 260-262, JX-26).

¹¹ Respondent admitted that by “others” it was referring in part to temporary employees (28). The only temporary employees hired during the lockout were unit members who had resigned their membership in the Union (29).

As in *Schenk*, Respondent’s clear message to employees was ‘withdraw from the union or be locked out.’ By informing unit employees that only union members would be locked out, and by soliciting employees to apply to work during the lockout, Respondent’s conduct “quite reasonably tended to interfere with, restrain and coerce the unit employees in the exercise of their Section 7 rights, and violated Section 8(a)(1).” *Schenk*, 301 NLRB at 489, citing *A-1 Schmidlin*, *supra*, and *Manhattan Hospital*, *supra*.

In sum, having applied the Board standard for determining whether a Section 8(a)(1) violation exists to the overwhelming and largely undisputed facts of this case, Counsel for the General Counsel strongly urges the Administrative Law Judge to find that Respondent violated Section 8(a)(1) of the Act by informing its employees that only union members would be locked out and by impliedly soliciting its employees to resign from the union so that they could be employed during the lockout.

B. Respondent violated Section 8(a)(3) of the Act when it locked out its unit employees who were members of the Union, while permitting its unit employees who were not members of the Union to continue to work.

Respondent’s subsequent lockout of only the Union members in the bargaining unit violates Section 8(a)(3) of the Act. Section 8(a)(3) makes it illegal to discriminate in a way which encourages or discourages membership in a labor organization. This language “means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose.” *NLRB v. Great Dane Trailers, Inc.* 388 US 26, 33 (1967). “A bargaining lockout is lawful only if its sole purpose is to bring economic pressure to bear in support of a legitimate bargaining position.” *KLB Industries, Inc.*, 357 NLRB 127, 130 (2011), *enfd.* 700 F.3d 551 (D.C. Cir. 2014) citing *American Ship Building v. NLRB*, 380 US 300, 318 (1965). See also, *Allen Storage & Moving Co.*, 342 NLRB 501 (2004).

Lockouts have been found to be unlawful when they are motivated by antiunion animus. *Schenk, supra*. In *Schenk*, as in the present case, the employer informed its employees that all its union members would be locked out, but that union members who resigned from the union could be hired as temporary employees during the lockout. *Schenk*, 301 NLRB at 488. The Board in *Schenk* stated that,

In considering the lockout of unit employees that began on April 28, we find substantial guidance in the Supreme Court's opinion in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). There the Court held that an employer may lawfully lock out its unit employees temporarily for the sole purpose of applying economic pressure in support of its valid bargaining position. *Id.* at 318. In discussing the appropriateness of examining the employer's motivation for establishing its lockout in the context of alleged 8(a)(3) discrimination, the Court noted the limited nature of the situation before it: 'There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that the employer conditioned rehiring upon resignation from the union.' *Id.* at 312.

Schenk, 301 NLRB at 489-490. The Board went on to state,

We conclude, therefore, that an unavoidable effect and, hence, unstated purpose of the lockout was to discourage unit employees' membership in the Union by denying employment to those who maintained that status. Accordingly, the Respondent's conduct violated Section 8(a)(3) and (1), as alleged in the complaint. See *United Chrome Products*, 288 NLRB 1176 fn. 2 (1988), in which the Board found, *inter alia*, an 8(a)(3) violation, concluding that the employer's lockout of unit employees followed by their rehire as new, probationary employees was a device to implement unlawfully a unilateral change in seniority rights.

Schenk, 301 NLRB at 490.

In the present case, as in *Schenk*, anti-union animus is established by the Employer's partial lockout which was limited to union members, coupled with the hiring of unit members who resigned from the Union as temporary replacements. Respondent asserted no defense to its clearly violative actions beyond an apparent belief that its "hiring" of unit employees who had

resigned membership in the Union to work during the lockout was valid because Respondent hired them as “temporary employees” (27).¹²

The facts in the present case establish, as in *Schenk*,

that an unavoidable effect and, hence, unstated purpose of the lockout was to discourage unit employees’ membership in the Union by denying employment to those who maintained that status. Accordingly, the Respondent’s conduct violated Section 8(a)(3) and (1) as alleged in the complaint.

Schenk, 487 NLRB at 490, citing *United Chrome Products*, supra.

Having established that anti-union animus drove Respondent’s conduct, it must be found that Respondent violated Section 8(a)(1) and (3) of the Act when it locked out its unit employees who were members of the Union, while permitting its unit employees who were not members of the Union to continue working, as alleged in the Complaint. Counsel for the General Counsel urges the Administrative Law Judge to make such a finding.

C. Respondent violated Section 8(a)(5) of the Act when it insisted as a condition of reaching any collective-bargaining agreement that the Union agree to change the scope of the bargaining unit, and partially implemented its last, best and final offer by expanding the bargaining unit without consent.

A party’s proposal to alter the scope of an existing bargaining unit is a permissive subject of bargaining. *Syncor International Corp.*, 282 NLRB 408, 409 (1986). Once a specific job has been included in a bargaining unit, it cannot be moved from the unit absent the union’s consent or a Board order. *Wackenhut Corp.*, 345 NLRB 850, 852 (2005). Because altering the scope of the unit is a permissive subject of bargaining, while the first party may raise the issue, the other party may refuse to discuss it and absent an agreement, the proposal cannot be unilaterally implemented, even if the parties would otherwise have bargained to impasse. “Because neither

¹² It is undisputed that “an employer does not violate Section 8(a)(3) and (1), absent specific proof of antiunion motivation, by using temporary employees to engage in business operations during an otherwise lawful lockout...” *Harter Equipment, Inc.*, 280 NLRB 597, 600 (1986), enf. 829 F. 2d 458 (3d Cir. 1987). As discussed, the antiunion animus in the present case is clear.

party is required to bargain at all over a permissive subject, a party may not lawfully bargain to impasse over a permissive subject.” *Antelope Valley Press*, 311 NLRB 459, 460 (1993). It is undeniable that unit description clauses are nonmandatory subjects of bargaining. *Bremerton Sun Publishing Co.*, 311 NLRB 467, 474 (1993).¹³

Throughout negotiations Respondent sought to change the scope of the bargaining unit by the creation of the Operator 3 classification. However, at the hearing, Respondent’s counsel attempted to elicit testimony from Doty that Respondent was merely seeking to move some of the die setter’s work into the Operator 3 classification, and not the die setters themselves.¹⁴ This appears to be a belated attempt to recharacterize Respondent’s proposal as merely a change to work assignments, which may be a mandatory subject of bargaining. *Antelope*, supra. But this obfuscation is contradicted by Respondent’s stipulation that on November 9, 2017 Respondent “proposed placing some Die Setter employees represented by the IAM and their duties into the Operator [3] classification” (JX-34, par. 17).

During bargaining, Respondent did not merely seek to bargain over the assignment of work, rather its clearly expressed intent was to move the die setter employees and their work from the unit represented by the IAM to the unit represented by the Union. Significantly, both Wilds’ and Jacks’ testified in a clear and consistent manner that Respondent took the position during bargaining that the Operator 3 classification was “where the die setters and their work would go” (71); that the Operator 3 classification was “reserved for the die setters and their work” (75); that the Operator 3 “classification couldn’t have any of our people in it, it was for

¹³ The terms “permissive” and “nonmandatory” are used interchangeably in Board cases. See e.g. *Beverly Enterprises, Inc.*, 341 NLRB 296 (2004) (“nonmandatory”); *Antelope Valley Press*, 311 NLRB at 460 (“permissive”).

¹⁴ “[W]hat happened to the work that was assigned to die setters under the original IAM agreement?” (42). “Where did the work for that new position go? [45]”

the die setters and their work when they came over from the IAM” (78); and “from day one we were informed that the operator 3 classification was reserved for the die setters when they negotiated them away from the IAM over into the USW” (101). (71, 75, 78, 101). Wilds’ and Jacks’ reasonable understanding that Respondent sought to change the scope of the unit, and not just to change work assignments, is reinforced by Doty’s own written words. In Doty’s letter to Jacks dated March 13, 2018 Doty admitted that “it is the Company’s intention to move the die setters to Class III Operator, something that has been discussed at length in negotiations” (JX-22, p. 2).¹⁵ When Respondent could not obtain the Union’s consent to its demand, it declared impasse and implemented its proposal to create three job classifications (JX-34 at 29).

The evidence establishes that Respondent unlawfully implemented a demand based on a permissive subject, for which it had not secured the Union’s consent. Accordingly, Board law compels a finding that Respondent violated Section 8(a)(1) and (5) of the Act when it partially implemented its last, best and final offer without consent. Counsel for the General Counsel urges the Administrative Law Judge to make such a finding.

D. Respondent violated Section 8(a)(5) of the Act when, during a partial lockout of unit employees, it withdrew its last, best and final offer and failed to inform the Union of the terms under which the partial lockout could be ended.

A “fundamental principle underlying a lawful lockout is that the Union must be informed of the employer’s demands, so that the Union can evaluate whether to accept them and obtain reinstatement.” *Dayton Newspapers, Inc.*, 339 NLRB 650, 656 (2003), enf. in relevant part 402

¹⁵ The facts do not support Respondent’s contention at hearing that the Operator 3 classification was also intended to house employees and work already performed by members of the unit represented by the Union. First, it is undisputed that the job responsibilities listed in Respondent’s Operator 3 job description (JX- 4) were duties only performed by IAM-represented die setters (70-72). Second, Respondent assigned all the employees represented by the Union to the Operator I and II classifications. Scott Shimp, the only employee assigned to Operator 3, was assigned to that work because, as discussed above, Shimp, a member of the IAM unit, “was a die setter, and [Respondent’s President] Paolo [Ghigo] wanted the die setters in operator 3, that’s why he [Shimp] was in operator 3” (74).

F.3d 651 (6th Cir. 2005). See also *Alden Leeds, Inc.*, 357 NLRB 84, 93 (2011), *enfd.* 812 F.3d 159 (D.C. Cir. 2016); *Eads Transfer, Inc.*, 304 NLRB 711, 712 (1991), *enfd.* 989 F.2d 373 (9th Cir. 1993). This principal applies both when a layoff is imposed defensively, in response to a strike, and offensively, in support of bargaining demands. *Alden Leeds*, *supra*; *Boehringer Ingelheim Vetmedica*, 350 NLRB 678, 679 (2007).

Here, the lockout began at 11:00 p.m. on March 12. The next morning, by email, the Employer withdrew its entire bargaining proposal. The email, from HR Director Doty to Local Union President Wilds, reads in pertinent part, “Please be informed that the last, best and final offer from the company has been given to the union and will expire at 11pm on March 13, 2018” (JX-20). On March 14, GMP Executive Officer Pete Jacks, in a letter which was emailed to Doty, stated “it is the Union’s understanding that the Company withdrew its ‘last, best and final’ offer (‘LBF’) as of 11:00 pm on March 13, 2018. Can you confirm that is the case?” (JX-23). Doty did not respond (JX-34 at 40). From 11 p.m. on March 13, 2018 until the parties met and reached agreement on March 19, 2018 there was no offer on the table.

Once Respondent withdrew its last, best and final offer, there was no offer for the Union to accept. Moreover, by failing to answer Jacks’ inquiry as to the existence of an offer, the Employer failed to clarify its proposal. Thus, Respondent “had not clearly and fully set forth th[e] conditions” the Union could accept to end the lockout, and, under these circumstances “the Union could not intelligently evaluate its position and obtain reinstatement.” *Dayton Newspaper, Inc.*, 339 NLRB at 656.

At the hearing, Respondent’s counsel asked Doty a series of questions apparently intended to elicit from him testimony that at the bargaining table on March 19, 2018, the Union did not again raise the expiration of Respondent’s last, best and final offer (56-57). While this

may be true, the Union had no obligation to give Respondent a second chance. Moreover, while it is undisputed that Respondent placed a new offer on the table on March 19, that late action failed to cure Respondent's initial illegal action. In *Alden Leeds*, supra, the employer failed to give the union a complete contract offer until almost one week after it had locked out unit employees. The Board in that case found that "the lockout's initial illegality was not cured" by the company's tardy action. It held that "it is well established that 'a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole.'" *Alden Leeds*, supra, 357 NLRB at 84 fn. 3, citing *Movers & Warehousemen's Assn. of Metropolitan Washington, D.C., Inc.*, 224 NLRB 356, 357 (1976), enfd. 550 F.2d 962 (4th Cir. 1977), cert. denied 434 U.S. 826 (1977). In the present case, it is undisputed that on March 22, 2019 the lockout was terminated, and employees were reinstated, however, they have not yet been made whole.

It is incontrovertible that Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew its last, best and final offer and when it failed to inform the Union of the terms under which the partial lockout could be ended. Counsel for the General Counsel urges the Administrative Law Judge to make such a finding.

E. Respondent violated Section 8(a)(5) of the Act when it bypassed the Union and dealt directly with its employees in the Unit by impliedly soliciting employees to enter into individual employment contracts with Respondent to work during the partial lockout.

An employer violates Section 8(a)(1) and (5) of the Act when it bypasses a union and deals directly with its employees. The Board in *El Paso Electric Co.*, 355 NLRB 544 (2010) stated that:

The established criteria for finding that an employer has engaged in unlawful direct dealing are "(1) that the [employer] was communicating directly with union represented employees; (2) the discussion was for the purpose of establishing or

changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union.” *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), citing *Southern California Gas Co.*, 316 NLRB 979 (1995).

El Paso Electric, 355 NLRB at 545.

Each of these criteria is easily met in the present case. The first criterion contains two requirements, that an employer communicate directly with employees and that those employees be represented by a union. It is undisputed that on the first day of the lockout Darrick Doty met in his office with the six employees who had resigned their membership in the Union (33). However, each of the six employees was still employed in the unit represented by the Union (JX-34 at 43). This clearly shows that the first criterion has been met.

The second and third criteria are also met. As established above, Respondent had previously informed employees that they could continue to work if they resigned from the Union. After six employees resigned their membership so that they could continue to work, Respondent drafted letters of hire which they required the employees to sign to continue to work during the lockout. Respondent admitted that it did not negotiate with the Union over the letters of hire (32-33). These letters of hire also altered their terms of employment. Unit employees were not “employees at will” (32). By executing the letters of hire, the employees who had resigned from the Union became “employees at will” whose employment could be ended “at any time” and “for any reason or no reason” (JX-26).

Based on the foregoing, there can be no doubt that Respondent violated Section 8(a)(1) and (5) of the Act when it bypassed the Union and dealt directly with employees by soliciting them to enter into individual employment contracts with Respondent to work during the partial lockout, and Counsel for the General Counsel urges the Administrative Law Judge to so find.

V. CONCLUSION AND REQUESTED REMEDIES

It is respectfully submitted that the record evidence as set forth at the hearing and argued above amply supports all the allegations of the Complaint and requires findings by the Administrative Law Judge that Respondent violated Section 8(a)(1) (3) and (5) of the Act in the manner alleged. Accordingly, Counsel for the General Counsel respectfully requests the Administrative Law Judge issue the attached proposed Order requiring Respondent to cease and desist from all its unlawful conduct; and affirmatively directing Respondent to appropriately remedy the alleged unfair labor practices.

It is further requested that Respondent be ordered to post an appropriate Notice to Employees at its Glen Dale, West Virginia, facility where such notices would normally be posted, in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001). In addition to physical posting of the paper notices, notices should be distributed electronically, such as by email or posting on an intranet site, if Respondent customarily communicates with its employees by these means.¹⁶

Dated at Pittsburgh, Pennsylvania, this 2nd day of April 2019.

Respectfully submitted,

/s/ Clifford E. Spungen
Clifford E. Spungen
Counsel for the General Counsel

NATIONAL LABOR RELATIONS BOARD
Region Six
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222-4111

¹⁶ For the convenience of the Administrative Law Judge, a proposed Order is attached as Appendix A, and a proposed Notice to Employees is attached as Appendix B.

APPENDIX A

PROPOSED ORDER

Respondent Tecnocap LLC, its officers, agents, and representatives, shall:

1. Cease and desist from
 - (a) Discouraging membership in the Union by telling employees that we will only lockout union members and impliedly soliciting their resignations from United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL-CIO, CLC. (“Union”);
 - (b) Discouraging membership in the Union by locking out unit employees who are members of the Union while permitting unit employees who are not members of the Union to continue working;
 - (c) Failing to obtain the Union’s consent prior to unilaterally implementing its proposal on a permissive subject of bargaining;
 - (d) Locking out Union members in support of a demand that the Union agree to a contract provision to change the scope of the bargaining unit, a permissive subject of bargaining;
 - (e) Bypassing the Union and dealing directly with unit employees by soliciting employees to enter into individual employment contracts offering employees employment during a partial lockout on the condition that they abandon their membership in the Union;
 - (f) Partially implementing its last, best and final offer by establishing new job classifications without reaching good faith impasse;
 - (g) Failing and refusing to reinstate its locked-out employees without giving the Union clear conditions for reinstatement, and;
 - (h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Make whole those employees who were unlawfully locked out from March 12 through March 21, 2018, for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them by paying them a sum of money equal to the amount they normally would have earned from March 12 through March 21, 2018, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).
- (b) Remove from its files any reference to the unlawful lockout as it pertains to each affected employee and notify the employee in writing that this has been done and that the lockout will not be used against him/her.
- (c) Within 14 days after service by the Region, post at its Glen Dale, West Virginia facility copies of the attached Notice to Employees marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region Six, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (d) Within 21 days after service by the Region, file with the Regional Director for Region Six a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: _____

Michael A. Rosas
Administrative Law Judge

APPENDIX B

PROPOSED NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL-CIO, CLC (“Union”) is the employees’ representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit:

All hourly rated production and maintenance employees, including warehousemen, except employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

WE WILL NOT solicit your resignations from membership in the Union.

WE WILL NOT discourage membership in the Union by permitting employees who have resigned from the Union to work while locking out employees who are union members.

WE WILL NOT select for lockout our unit employees who are members of the Union while permitting our unit employees who are not members of the Union to continue working during a partial lockout.

WE WILL NOT bypass your Union and deal directly with you by offering you employment during a partial lockout on the condition that you abandon your membership in the Union.

WE WILL NOT fail to notify the Union during a partial lockout of the terms under which the partial lockout could be ended.

WE WILL NOT make changes to the scope of your bargaining unit without first obtaining the consent of your Union.

WE WILL NOT lock out Union members over our demand to change the scope of your bargaining unit.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL make whole those employees whom we selected for lockout for all losses they suffered because of our having unlawfully locked them out from March 12, 2018 through March 21, 2018